Supreme Court, U.S.
FILED

98 631 OCT 15 1998

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1998

JOSEPH WEEKS,
Petitioner,

v.

OKLAHOMA BAR ASSOCIATION,
Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of the State Of Oklahoma

PETITION FOR WRIT OF CERTIORARI

Joseph Righton Weeks
Oklahoma City University
School of Law
2501 N. Blackwelder
Oklahoma City, OK 73106
(405) 521-5186

Counsel of record

---

69 pp

Question Presented

Whether federal law permits a prospective federal civil rights plaintiff to pay, and her attorney to accept, a contingent fee for the attorney's representation that consists of both the statutory attorney fee as well as a portion of the judgment or settlement when it is not disputed that, without the ability to offer such a fee, civil rights plaintiffs may find it difficult to obtain competent counsel.

Parties Below

This petition arises from a disciplinary proceeding brought by the Respondent Oklahoma Bar Association against the Petitioner that was consolidated for hearing and decision with a separate proceeding brought against Mr. Mark Nation. Mr. Nation is not a party before this Court.

Table of Contents

Question Presented i

Parties Below ii

Table of Contents iii

Table of Authorities iv

Reports of opinions below 1

Jurisdictional statement 1

Statutory provisions involved 1

Statement of the case 2

I. Factual summary 2

II. How the federal question was raised 4

Reasons for granting the writ 5

I. The impact of the Oklahoma Supreme Court's decision 6

II. The Oklahoma Supreme Court's error 8

A. Policy 8

B. Venegas v. Mitchell 13

C. Assertedly contrary caselaw 16

III. What the case does not involve 8

Conclusion 17

Table of Authorities

Cases:

Black Grievance Committee v. Philadelphia Elec. Co.,
690 F. Supp. 1393, 1398-1401 (E.D. Pa. 1988) 17

Blum v. Stenson,
465 U.S. 886, 897 (1984) 11

City of Burlington v. Dague,
503 U.S. 557 (1992) 14-15, 17-18

City of Riverside v. Rivera,
477 U.S. 561 (1986) 13, 19

Davis v. City & County of San Francisco,
976 F.2d 1536 (9th Cir. 1992) 18

Evans v. Jeff D.,
475 U.S. 717 (1986) 14

Fadhl v. City and County of San Francisco,
859 F.2d 649 (9th Cir. 1988) 17

Fite v. First Tennessee Production Credit Ass'n,
861 F.2d 884 (6th Cir. 1988) 17

Flight Attendants v. Zipes,
491 U.S. 754 (1989) 18

Hensley v. Eckerhart,
461 U.S. 424 (1983) 18

Hidle v. Geneva County Bd. of Education,
681 F. Supp. 752 (M.D. Ala. 1988) 16, 20-21

Homeward Bound, Inc. v. Hissom Memorial Center,
963 F.2d 1352 (10th Cir. 1992) 15

Huntington Branch NAACP v. Town of Huntington,
749 F. Supp. 62 (E.D.N.Y. 1990),
vacated in part and remanded for additional findings,
961 F.2d 1048 (2d Cir. 1992) 17

International Travel, Inc. v. Western Airlines, Inc.,
623 F.2d 1255 (8th Cir. 1980) 27-28

James v. Frank,
772 F. Supp. 984 (S.D. Ohio 1991) 17

Kay v. Ehrler,
499 U.S. 432 (1991 11

Lattimore v. Oman Constr.,
868 F.2d 437 (11th Cir. 1989) 17

Northcross v. Board of Ed. of Memphis City Schools,
412 U.S. 427 (1973) 18

Pennsylvania v. Delaware Valley
Citizens' Council for Clean Air,
483 U.S. 722 (1987). 11

Raley v. Ohio,
360 U.S. 423 (1959) 8

Riverside v. Rivera,
477 U.S. 561 (1986) 11, 13

Robinson v. Alabama State Dept. of Education,
727 F. Supp. 1422 (M.D. Ala. 1989), *aff'd,*
918 F.2d 183 (11th Cir. 1990) 17

Ruckelshaus v. Sierra Club,
463 U.S. 680 (1983) 18

Venegas v. Mitchell,
495 U.S. 82 (1990) 22-24, 26, 28

Weseley v. Spear, Leeds & Kellogg,
711 F. Supp. 713 (E.D.N.Y. 1989) 17

Statutes:

28 U.S.C. § 1257(a) 2

29 U.S.C. § 1451(e) 2

42 U.S.C. § 12205 2

42 U.S.C. § 1988(b) 2

42 U.S.C. § 2000e-5(k) 2

5 Okla. Stat § 7 16

Other Authority:

Rule 1.5(a), Okla. R. Prof. Conduct. ..... passim

Susan Koniak, *Through the Looking Glass of Ethics and the Wrongs with Rights We Find There,* 9 GEO. J. LEGAL ETHICS 1 (1995). 10

John Leubsdorf, *The Contingency Factor in Attorney Fee Awards,* 90 Yale L.J. 473 (1981). 15

No. _____

In The
Supreme Court of the United States
October Term, 1998

JOSEPH WEEKS,
Petitioner,

v.

OKLAHOMA BAR ASSOCIATION,
Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Oklahoma

PETITION FOR WRIT OF CERTIORARI

Joseph Weeks respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Supreme Court in this case.

OPINIONS BELOW

The opinion of the Oklahoma Supreme Court is reported at 69 Okla. Bar J. No. 29 at 2647 (July 18, 1998) as well as ____ P.2d ____ (Okla. 1998). The opinion is reproduced in the Appendix to this Petition at A—1 et seq. The opinion of the Trial Panel is not reported and is reproduced in the Appendix to this Petition at B—1 et seq.

JURISDICTION

The decision of the Oklahoma Supreme Court was filed on July 14, 1998. Petitioner's timely Motion for Rehearing to that court was denied on September 8, 1998. Pursuant to Supreme Court Rule 13.1, this petition has been filed within ninety days of the denial of rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1988(b) provides as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], Title VI of the Civil Rights Act of 1964 [42 U.S.C.A § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 2000e-5(k) provides as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 12205 provides as follows:

> In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

29 U.S.C. § 1451(e) provides as follows:

> In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

STATEMENT

I. Factual summary

The Petitioner is a law professor.[1] Prior to beginning his academic career, he had practiced in the areas of labor and employment law in both private practice and as the Deputy Associate Solicitor for Special Litigation with the U.S. Department of Labor. As a consequence of this, he is occasionally asked by attorneys representing federal civil rights plaintiffs to assist in the representation.

The Petitioner was asked by Mark Nation, an attorney recently admitted to practice, to assist him in the representation

---

[1] *See* Appendix at A—3, ¶ 3.

of one Nathaniel Dodoo.[2] As it developed, the representation consisted of initiating litigation in federal court asserting that Mr. Dodoo had been discharged from his employment in violation of Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, and the Employee Retirement Income Security Act, and that the discharge was actionable under various state causes of action.[3] The Petitioner and Mr. Nation agreed to undertake the representation in exchange for a fee that would be payable only in the event the contemplated litigation eventually produced a judgment or settlement in Mr. Dodoo's favor. In this event, the fee would consist of: (1) any statutory attorney fee awarded as well as (2) 50% of any judgment or settlement on the Mr. Dodoo's claim.[4] This fee was knowingly and voluntarily agreed to by Mr. Dodoo.[5]

---

[2] *See id.*

[3] *See id.*

[4] *See* Appendix at A—3-4, ¶ 4. The representation agreement contained other compensation provisions to provide for various contingencies. The text refers to the provisions of the agreement that were applicable in light of the events that subsequently occurred and that formed the basis for the disciplinary proceeding that is the subject of this petition.

[5] Specifically, the Trial Panel found that "there appears to be no question but that the contract was voluntarily entered into" and "the contract was entered into with a full understanding between the parties." *See* Appendix at B—2. These findings were unchallenged by the Respondent and not questioned by the Oklahoma Supreme

Suit was filed on Mr. Dodoo's behalf and an offer was ultimately obtained from the defendants to settle the litigation for $50,000, which Mr. Dodoo accepted.[6] Thereafter, the claim for statutory attorney fees was settled for $23,417.68.[7] Under the circumstances, the Petitioner and Mr. Nation agreed to accept only 40% of the settlement amount rather than the 50% that their agreement with Mr. Dodoo contemplated.[8] They thus took as their complete fee: (1) 40% of the settlement about, or $20,000, as well as (2) the $23,417.68 statutory attorney fee.[9] Mr. Dodoo received 60% of the settlement, or $30,000.[10]

Court.

[6] *See* Appendix at A—4, ¶ 5.

[7] *See* Appendix at A—5, ¶ 6.

[8] *See* Appendix at A—4, ¶ 5.

[9] *See* Appendix at A—5, ¶ 6. This is not literally accurate. Primarily so that there would be no question concerning the applicability of attorney-client privilege, the representation agreement provided that Mr. Dodoo was to pay, and he did pay, the sum of $10 as a nonrefundable retainer at the point that the Petitioner and Mr. Nation agreed to represent him. To avoid burdening the readability of this petition with purposeless qualification, Mr. Dodoo's payment of this $10 is hereafter ignored.

[10] *See id.*

Acting on a grievance subsequently filed by Mr. Dodoo, the Respondent asserted by means of a Disciplinary Complaint that this fee violated Rule 1.5(a) of the Oklahoma Rules of Professional Conduct, which provides in relevant part that "[a] lawyer's fee shall be reasonable."[11] The Trial Panel hearing this complaint recommended that, in light of the unsettled nature of the law in this area, no discipline should be imposed on Petitioner and Mr. Nation.[12] The Oklahoma Supreme Court, to which the matter was then referred, refused to accept this recommendation.

The Oklahoma Supreme Court viewed the fee agreement as a "self-enhancement" of, or "self-help" with respect to, the statutory attorney fee available in civil rights cases.[13] This, it held, "is not a viable concept in the area of attorney fees."[14] After reviewing a number of federal court decisions in this context, the court held as follows:

> In keeping with the above authorities, we are compelled to the conclusion that by retaining the entirety of the contingent fee deducted from Mr. Dodoo's recovery in addition to the statutory fee, respondents' fee arrangement *exceeded existing federal case law.* We

---

[11] *See* Appendix at A—5-6, ¶ 8.

[12] *See* Appendix at B—5-6.

[13] *See* Appendix at A—13, ¶ 21.

[14] *See id.*

> find that the Bar Association has therefore met its burden of showing by clear and convincing evidence that respondents' fee arrangement violated Rule 1.5(a).[15]

The court accordingly imposed discipline consisting of a public reprimand upon the Petitioner.[16]

For purposes of the appropriateness of this case for the granting of certiorari, it is significant that there is nothing in the Oklahoma Supreme Court's decision to suggest that there was anything fact specific that caused that court to reach the decision that it did. Indeed, the court made very clear that the *amount* of the fee was not a factor in its decision.[17] Without regard to the amount, the court accepted the proposition that federal law simply does not permit an attorney representing a federal civil rights plaintiff to receive a fee that is to consist of both the statutory attorney fee and a portion of the plaintiff's substantive recovery and that such a fee is therefore a per se violation of

---

[15] *See* Appendix at A—21, ¶ 42 (emphasis added); *see also* Appendix at A—3, ¶ 2 ("[R]espondents' dual fee arrangement at issue violated Rule 1.5(a). We find this recovery of the contingent attorney fee was not warranted under existing federal law . . . ."); Appendix at A—9, ¶ 13 ("The Bar Association submits that respondents' dual recovery was an unwarranted windfall not authorized by federal law which constitutes an unreasonable fee in violation of 1.5(a). We agree.").

[16] *See* Appendix at A—24, ¶ 48.

[17] *See* Appendix at A—22, ¶¶ 43-44.

Rule 1.5.[18]

II. How the federal question was raised

The federal question in this case arose in a somewhat unusual manner. The complaint filed by the Respondent simply alleged that the fee violated Rule 1.5 without any specific reliance upon federal law as the basis for this contention. Petitioner asserted in his answer that, because the imposition of discipline would frustrate the federal scheme under which civil rights claimants obtain counsel, such discipline was barred under the Supremacy Clause of the United States Constitution.[19]

Neither the Trial Panel nor the Oklahoma Supreme Court at any point addressed this defense. And in the case of the Oklahoma Supreme Court, this was appropriate. As noted previously, that court determined that the fee was in violation of federal law and that a fee that is unauthorized by federal law is per se "unreasonable" and therefore a violation of Rule 1.5. As the court's decision was *based* on federal law, Petitioner's Supremacy Clause defense was moot. But by the same token, of course, there is therefore no question but that the federal

---

[18] *See* Appendix at A—22, ¶ 44.

[19] *See* Appendix at A—10-11, ¶ 17.

issue is properly presented to this court.[20] This Court clearly has jurisdiction to grant the writ.

REASONS FOR GRANTING THE WRIT

Review by this Court is sought pursuant to Supreme Court Rule 10.1(c). As set out below, the Oklahoma Supreme Court's decision decided an important question of federal law in a way that conflicts with applicable decisions of this Court. To the extent that the decision does not conflict with applicable decisions of this Court, the question involved should be settled by this Court.

I. The impact of the lower court's decision

The necessary (and, presumably, the intended) consequence of the Oklahoma Supreme Court's published ruling in this case will be that attorneys asked to undertake the representation of civil rights plaintiffs will not do so for a fee that is to consist of both the statutory fee award and a portion of the plaintiff's substantive recovery. But the Trial Panel determined — in findings uncontested by the Respondent and unquestioned by the Oklahoma Supreme Court — that there was "no evidence to rebut the fact that without this type of a contract it would be difficult to obtain competent counsel for complainants."[21] As this suggests, the result in this case does

---

20 *See, e.g., Raley v. Ohio,* 360 U.S. 423, 436-37 (1959)("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.").

21 *See* Appendix at B—3.

not mean that attorneys will charge another fee in civil rights cases, but that in many cases they simply will not agree to undertake the representation at all. Of itself, a limitation on the ability of those having federal civil rights claims to obtain competent counsel to bring their claims to court would be deserving of certiorari review even if its effect were limited to just one state.

But the effect of the decision will not, of course, be limited to Oklahoma. There is nothing unique about the market in Oklahoma for civil rights counsel. Nor is there anything unique about the disciplinary rule that the Petitioner has been found to have violated; Rule 1.5 or its Model Code analogue, DR 2-106, has been adopted as a part of the disciplinary rules in virtually every state.[22] If the fee utilized by the Petitioner is in conflict with federal law and thus a per se violation of Rule 1.5, as the Oklahoma Supreme Court has now held, it is not simply prospective federal civil rights plaintiffs in Oklahoma who can be expected to experience difficulty in obtaining competent counsel. Those having such claims in any state can be expected to experience similar difficulty.

The prospect of this being the result of the Oklahoma Supreme Court's imposition of discipline upon Petitioner is all the more real because of the absence of opposing caselaw. To Petitioner's knowledge, no court has previously considered the question of the legitimacy under federal law of a fee agreement

---

22 *See generally* Susan Koniak, *Through the Looking Glass of Ethics and the Wrongs with Rights We Find There,* 9 Geo. J. LEGAL ETHICS 1, 4 n.14 (1995)("Some version of either Model Rule 1.5 or Model Code DR 2-106 is in force in virtually every state.").

under which a federal civil rights claimant obtains representation by means of a fee arrangement under which, if the litigation is successful, the attorney will receive both any statutory fee award and a portion of the plaintiff's substantive recovery. Lacking such opposing caselaw, and in light of the federal court decisions that were relied upon by the Oklahoma Supreme Court, attorneys in every state can be expected to conclude that discretion is the better part of valor. They will accordingly decline the representation of civil rights claimants when such representation might have been accepted if the attorney and his prospective client were permitted to agree to a fee of the kind utilized by the Petitioner in the present case.

There is, of course, no way in which Petitioner can quantify the impact of the Oklahoma Supreme Court's decision. But in some unknown and unknowable number of cases, there is simply no question that prospective federal civil rights plaintiffs across Oklahoma, and in other states as well, will now find it difficult to obtain competent counsel. Given this Court's consistent recognition that attorney fees received by those who represent federal civil rights plaintiff must be sufficient to permit the plaintiff to obtain competent counsel,[23] there is a very

---

23 *See, e.g., Kay v. Ehrler,* 499 U.S. 432, 435-36 (1991)(specific purpose of award of attorney fees is to "enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 733 (1987)(reasonable statutory fee award should be one that would attract "competent counsel"); *Riverside v. Rivera,* 477 U.S. 561, 578 (1986)(purpose of awarding attorney's fees is "to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of

compelling basis for this Court to review the decision of the court below and determine whether, in fact, federal law does mandate this result.

What has to this point been said describes a compelling reason why certiorari review, and reversal, will avoid diminishing the present ability of prospective civil rights plaintiffs to obtain counsel. But such review may well do much more than this.

As outlined above, the Oklahoma Supreme Court's decision will cause those attorneys now willing to represent civil rights plaintiffs for a fee of the kind agreed to by Mr. Dodoo to now refuse to do so. But even prior to that court's decision, those seeking representation to pursue civil rights claims have had great difficulty obtaining counsel because many attorneys have been unwilling to accept such cases in the absence of an ability to receive a fee of the kind Mr. Dodoo agreed to pay and have been unwilling, due to the uncertainly in the law, to accept such a fee. Absent clear authority to assure such attorneys that they may undertake the representation in exchange for such a fee, they have been simply unwilling to assume the risk that, by doing so, they will be subject to a disciplinary proceeding of the kind brought against the Petitioner.

The point here is that the Oklahoma Supreme Court's decision, although wrong, is not bizarre. The same reasoning

---

competent counsel"); *Blum v. Stenson,* 465 U.S. 886, 897 (1984)(statutory attorney fee awarded should be "adequate to attract competent counsel").

that caused that court to reach the conclusion that it did has almost certainly caused many attorneys to question whether they may validly accept the representation of a civil rights plaintiff in exchange for the kind of fee that Mr. Dodoo agreed to pay. Certiorari review by this Court, and reversal, will thus have the positive consequence of assuring such attorneys that they need not fear a per se rule that would condemn such a fee.

II. The Oklahoma Supreme Court's error

The Oklahoma Supreme Court was wrong in concluding that federal law will not permit the fee that Mr. Dodoo agreed to pay to the Petitioner and Mr. Nation. As set out below, federal law does not prohibit such a fee.

A. Policy

Two decisions of this Court have had a significant impact on the ability of prospective civil rights plaintiffs to obtain counsel. The first of these significantly increased the risk that the plaintiff's counsel will be paid nothing for her work. The second sharply diminished the attorney's prospective compensation in the event the litigation brought on the plaintiff's behalf is successful.

An attorney agreeing to accept any kind of case on a contingency basis understands that there is a risk of being paid nothing for her work if the case cannot be won. But there are other risks confronted by an attorney asked to represent a civil rights plaintiff. Quite often in such cases, the amount of work that must be performed by the plaintiff's counsel is such that, eventually, the defendant's potential exposure for the statutory

attorney fee will exceed his potential exposure upon the plaintiff's substantive claim.[24] This fact has led to a tactic not uncommon with defendants in such cases by which the plaintiff is offered a settlement that equals or exceeds what he could expect to obtain by winning the suit at trial but with the proviso that his claim for attorney fees must be waived as a condition of the settlement. Other than an altruistic concern for the welfare of his attorney, such a plaintiff would have no reason to refuse a settlement of this kind, particularly when refusal may result in losing at trial and obtaining nothing at all.

In *Evans v. Jeff D.*,[25] the Court considered this tactic and ultimately held that the federal courts have no authority to interfere with a plaintiff's waiver of attorney fees to obtain a favorable settlement.[26] As a result of *Evans*, the attorney asked to represent a civil rights plaintiff now faces not only the risk of being paid nothing if the plaintiff does not prevail, but in many cases also the risk of being unable to obtain compensation financed by the statutory attorney fee even if the case is "won."

Before she can decide whether to accept a particular civil rights case, an attorney must first decide whether, and upon what terms of compensation, to accept civil rights cases as a

---

[24] *See, e.g., City of Riverside v. Rivera*, 477 U.S. 561, 564-65 (1986)(noting plaintiff's receipt of $33,350 in compensatory damages and just under $250,000 in statutory attorney fees).

[25] 475 U.S. 717 (1986).

[26] *See id.* at 730-38.

class. Because of the risk of loss and the *Evans* risk of having the plaintiff agree to waive an award of statutory attorney fees as the price of a settlement, contingent compensation for civil rights cases must be significantly higher than cases in which the attorney's fee is noncontingent. Put simply, the "winners" must provide sufficient compensation so that the attorney is adequately compensated for work performed in the entire class of civil rights cases that she accepts, winners and losers, or else she simply will not accept such cases as a class. As the Court has recognized, "[a]n attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not."[27] This means that contingent compensation in civil rights cases has to be significantly greater than the noncontingent compensation that is sufficient to attract competent counsel in other kinds of cases.[28]

---

[27] *City of Burlington v. Dague*, 503 U.S. 557, 565 (1992).

[28] As Justice Blackmon noted in his dissenting opinion in *City of Burlington*, "it is a fact of the market that an attorney who is paid only when his client prevails will tend to charge a higher fee than one who is paid regardless of outcome, and relevant professional standards long have recognized that this practice is reasonable." *City of Burlington*, 503 U.S. at 567 (Blackmon, J., dissenting)(footnotes omitted). *See also Homeward Bound, Inc. v. Hissom Memorial Center*, 963 F.2d 1352, 1358-59 (10th Cir. 1992)("We have no doubt that contingent fee cases 'typically generates fees (if at all) substantially in excess of their more conservative counterparts,' such as hourly retainer cases, in order to compensate the attorney for the risk of losing and not being paid."). *See generally* John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473,

How is such compensation to be paid by the prospective civil rights plaintiff? If the applicable fee statute permits an award of statutory fees to the prevailing plaintiff that takes the contingent nature of the attorney's compensation into account, then competent counsel might well accept such cases based on the statutory fee alone since in this event the attorney's fee in cases that are won would compensate for the cases in which the case is lost or in which the client has agreed to an *Evans* settlement that includes a waiver of the statutory fee. And for just this reason, at one point a "contingency enhancement" of statutory attorney fee awards was both permissible and not uncommon.[29]

---

480 (1981)("A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.").

[29] As an example, the federal district court in *Hidle v. Geneva County Board of Education,* 681 F. Supp. 752 (M.D. Ala. 1988), increased the lodestar computation by 100% to take the contingent nature of the attorney's compensation into account and noted in doing so the effect of the failure of some courts to grant a contingency enhancement in employment discrimination cases.

> Most of the cases in which lawyers agree to contingency arrangements involve personal injury and debt collection. Very few lawyers in Alabama are, however, willing to undertake such arrangements in employment discrimination cases. This difference is for the most part due to the availability of substantial fee enhancement with the former cases, and the lack of such with the latter cases. The evidence before the court convincingly

In *City of Burlington v. Dague*,[30] however, a sharply divided Court held that the attorney fee available under the fee shifting statutes cannot permissibly be enhanced to take into

---

> reflects that attorneys in the state are unwilling to undertake employment discrimination cases on a contingency basis because, in large part, they believe the cases are uneconomical; the fees they receive when successful are not high enough to justify taking the risk of losing such cases, especially since there is plenty of other, more profitable work available.

Id. at 757; *see also Lattimore v. Oman Constr.*, 868 F.2d 437, 439-40 (11th Cir. 1989)(upholding 100% contingency enhancement upheld); *Fadhl v. City and County of San Francisco*, 859 F.2d 649, 650-51 (9th Cir. 1988)(same); *Fite v. First Tennessee Production Credit Ass'n*, 861 F.2d 884, 894-95 (6th Cir. 1988)(upholding 75% contingency enhancement); *James v. Frank*, 772 F. Supp. 984, 1003-04 (S.D. Ohio 1991)(awarding 200% contingency enhancement); *Huntington Branch NAACP v. Town of Huntington*, 749 F. Supp. 62, 65-66 (E.D.N.Y. 1990)(awarding 75% contingency enhancement and noting that "the general rule recognized by the most recent cases is that a multiplier of .5 to 1 [or an enhancement of 50% to 100%] is appropriate to compensate for contingency"), *vacated in part and remanded for additional findings*, 961 F.2d 1048 (2d Cir. 1992); *Robinson v. Alabama State Dept. of Education*, 727 F. Supp. 1422, 1432-33 (M.D. Ala. 1989)(noting that 100% contingency enhancement in recent Alabama cases "has been viewed as minimally necessary to attract competent counsel for civil rights cases"), *aff'd*, 918 F.2d 183 (11th Cir. 1990); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 716-17 (E.D.N.Y. 1989)(awarding 100% contingency enhancement): *Black Grievance Committee v. Philadelphia Elec. Co.*, 690 F. Supp. 1393, 1398-1401 (E.D. Pa. 1988)(awarding 200% contingency enhancement).

[30] 505 U.S. 557 (1992).

account the contingent nature of the attorney's compensation.[31] After *City of Burlington*, the prospect of receiving the statutory attorney fee could not of itself be sufficient to induce competent counsel to take civil rights cases on a contingency basis.

---

[31] *See id.* at 560-67. *City of Burlington* was a case involving the fee shifting provisions incorporated in the Resource Conservation and Recovery Act and the Clean Water Act. *See id.* at 559. In *City of Burlington* and in other cases, however, the Court has consistently viewed its decisions under any of the various fee shifting statutes to be applicable to other such statutes. *See, e.g., id.* at 562 ("case law construing what is a 'reasonable' fee applies uniformly to all" fee-shifting statutes using the term); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 691 (1983)("similar attorney's fee provisions should be interpreted pari passu"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7 (1983)(the standards "set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party'"); *see also Flight Attendants v. Zipes*, 491 U.S. 754, 758 n. 2 (1989)("fee-shifting statutes' similar language is 'a strong indication' that they are to be interpreted alike"); *Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428 (1973)("[S]imilarity of language ... is, of course, a strong indication that ... two [attorney's fee] statutes should be interpreted pari passu"). Every court to have considered the issue has accordingly held that, in light of *City of Burlington*, the fees available under the various civil rights fee shifting statutes cannot be enhanced to take the contingent nature of the attorney's compensation into account. *See, e.g., Davis v. City & County of San Francisco*, 976 F.2d 1536, 1549 (9th Cir. 1992)(noting, pursuant to *City of Burlington*, that fact that attorney's compensation is contingent on success of suit cannot be considered in setting hourly rate for attorney's work in calculating reasonable attorney fee for successful plaintiff).

In some cases, the prospective civil rights plaintiff may nevertheless be able to obtain counsel by means of offering a contingent fee that consists of a portion of his substantive recovery if the litigation is successful. This is how virtually all personal injury plaintiffs obtain counsel. But as the Court has recognized, in many cases the prospective damages available in civil rights litigation will be insufficient to attract competent counsel.[32]

If, then, neither the statutory attorney fee nor a portion of the substantive recovery will in many cases be sufficient in themselves to attract competent counsel, it follows that some combination of these sources of funds must be used. If representation is to be obtained at all in many cases, a civil rights plaintiff must be in a position to offer prospective counsel, if the litigation is successful, *both* the statutory attorney fee *and* a portion of his substantive recovery as a risk premium to compensate the attorney for the risk of being paid nothing for her work.

---

32 *See, e.g., City of Riverside v. Rivera,* 477 U.S. 561, 577 (1986)("[T]he contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage a lawyer to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries."); *id.* at 579 ("In light of the difficult nature of the issues presented by this lawsuit and the low pecuniary value of the many of the rights respondents sought to vindicate, it is highly unlikely that the prospect of a fee equal to a fraction of the damages respondents might recover would have been sufficient to attract competent counsel.").

The fee that Mr. Dodoo agreed to pay to the Petitioner and Mr. Nation to represent him does no more than this. If, as the Oklahoma Supreme Court has ruled, *any* such fee arrangement is in conflict with federal law and is therefore a per se violation of the applicable disciplinary rule, the inevitable result will be that prospective civil rights plaintiffs having claims with a modest potential recovery will be unable to attract competent counsel even though such claims may involve egregious violations of our civil rights laws. This cannot be what federal law requires.

What is actually at issue in this case was described very well by the court in *Hidle v. Geneva County Board of Education.*[33] And although the court was addressing in that case the situation in Alabama, it might well have been speaking of Oklahoma or of any other state.

> The court believes that a few additional comments are appropriate here. At issue here is much more than the simple question of how much Hidle's attorneys should receive as attorney fees. At issue is Alabama's continued full and vigorous commitment to this Nation's lofty, but as yet unfulfilled, agenda to make the promises of this land available to all citizens, without regard to race or sex or other impermissible characteristic. There are at least two ways to undermine this commitment. The first is open and direct: a repeal of this Nation's anti-discrimination laws. The second is more indirect and, for this reason, somewhat insidious: to deny victims of discrimination a means for redress by creating an economic

---

[33] 681 F. Supp. 752 (M.D. Ala. 1988).

> market in which attorneys cannot afford to represent them and take their cases to court. It appears from the undisputed evidence that Alabama squarely falls within the latter scenario; the state's already too small pool of attorneys willing to take civil rights cases is growing even smaller. The court therefore hopes that with the relief it affords today this trend will not only be halted, it will be dramatically reversed; the court sees its relief as not an isolated measure, but rather as a broad recommitment of Alabama's legal resources to the full and vigorous pursuit of civil rights.[34]

As the court in *Hilde* recognized, the effective enforcement of our civil rights laws to a large extent depends upon the ability of prospective civil rights plaintiffs to offer sufficent compensation to attract competent counsel to take their cases to court. The Oklahoma Supreme Court's decision in the present case seriously undermines that objective by making effectively unlawful the only fee arrangement that many such plaintiffs are in a position to offer. As a matter of policy, federal law should not be deemed to prohibit fee arrangements of the kind condemned by the Oklahoma Supreme Court in this case.

B. *Venegas v. Mitchell*

Not only policy but precedent requires this conclusion. Mr. Dodoo is by no means the first civil rights claimant who has retained counsel by means of a fee in excess of the statutory attorney fee, prevailed through the efforts of the attorney he has thereby retained, and then later insisted that his attorney must

---

[34] *Id.* at 758-59.

accept as his sole compensation the statutory attorney fee. This identical claim was made by the plaintiff in *Venegas v. Mitchell*.[35] Venegas, the plaintiff in that case, had retained Mitchell as his counsel by means of a contract that provided that, if the suit to be brought were successful, the attorney would receive 40% of the recovery with any statutory attorney fee being set off against the amount otherwise payable.[36] Ultimately a judgment of $2.08 million was obtained and a statutory fee award of $117,000.[37] Because there was co-counsel also sharing in the fee, Mitchell asserted a claim to $406,000 of this under his agreement with Venegas.[38] As with Mr. Dodoo in the present case, Venegas asserted that — despite their contract — Mitchell was entitled to receive only $75,000, the portion of the statutory fee award attributable to his work.[39]

This Court's opinion in *Venegas* was unanimous. There were neither dissenting nor concurring opinions. All nine justices subscribed to the opinion of Justice White for the Court rejecting the claim of Venegas that his attorney must accept as

---

35 495 U.S. 82 (1990).

36 *See id.* at 84.

37 *See id.* at 85.

38 *See id.*

39 *See id.* at 86.

his fee only the statutory fee award.

> [Our cases have not] indicated that [the civil rights attorney fee statute], by its own force, protects plaintiffs from having to pay what they have contracted to pay, even though their contractual liability is greater than the statutory award that they may collect from losing opponents. Indeed, depriving plaintiffs of the option of promising to pay more than the statutory fee if that is necessary to secure counsel of their choice would not further [the statute's] general purpose of enabling such plaintiffs in civil rights cases to secure competent counsel.
>
> In sum, [the statute] controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer. What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the "reasonable attorney fee" that a defendant must pay pursuant to a court order. [The statute] itself does not interfere with the enforceability of a contingent-fee contract.[40]

This Court unanimously held in *Venegas* that federal law does not prohibit a fee agreement by which Mitchell, the attorney, received a fee consisting of $75,000 financed by the statutory fee award and, in addition, $331,000 financed from the judgment on Venegas' substantive civil rights claim. *Venegas* is thus directly in conflict with the determination by the Oklahoma Supreme Court that federal law prohibits a fee that is to consist of both the statutory attorney fee and a portion of the

---

[40] *Id.* at 89-90.

plaintiff's substantive recovery.

The Oklahoma Supreme Court found *Venegas* to be distinguishable on the basis that, in that case, the fee agreement provided for the attorney to receive a percentage of the plaintiff's substantive recovery with any statutory fee award being applied to reduce, dollar for dollar, the sum that would otherwise be payable to the attorney out of the plaintiff's recovery on his substantive claim.[41] But nothing in the Court's opinion in *Venegas* even remotely suggest that this distinction is one that would be accepted by the Court. Again, the Court held in *Venegas* that "[the statute] itself does not interfere with the enforceability of a contingent-fee contract."[42]

And beyond this, any distinction drawn between the fee agreement in the present case and that used in *Venegas* is wholly a distinction of description. To appreciate this, the Court should consider a simple example.

Suppose that a Title VII claim is brought and ultimately results in a substantive judgment for $50,000 and a statutory fee award of $10,000. If the contract between the plaintiff and his lawyer was of the type used in *Venegas* and provided that the lawyer would be entitled to 50% of the recovery with the statutory attorney fee being offset against this, the attorney's resulting compensation would be $25,000 and the plaintiff would retain $35,000. The Respondent would have to

---

[41] *See* Appendix at A—17, ¶ 31.

[42] *Venegas*, 495 U.S. at 90.

concede, given *Venegas*, that such a fee would be proper under federal law. Suppose instead that the contract provided that the attorney would receive both the statutory fee award and 30% of the recovery. The attorney's resulting compensation would still be $25,000 and the plaintiff would still retain $35,000. But now, according to the Respondent, the fee is in conflict with federal law and the attorney must be satisfied with only the agreed 30% of the substantive recovery, or $15,000.

The claim that federal law will not permit a prospective civil rights plaintiff to offer both the statutory fee award and a portion of his recovery is also in conflict with the practical requirements of how they obtain counsel. As noted previously, when very large damages can be expected if the case is successful, as in *Venegas*, it may well be possible to attract competent counsel with simply the prospect of a portion of the plaintiff's substantive recovery if the suit is successful because in such cases success in the suit will produce a fee for the attorney that is commensurate with the work and risk that she assumes by taking the case. In such a case, the fee acceptable to competent counsel may well be one in which any statutory fee award is applied to reduce the amount that the attorney will receive from the plaintiff's substantive recovery.

This says nothing about the ability of a potential plaintiff such as Mr. Dodoo, with a very much smaller potential recovery if the case is successful,[43] to obtain counsel if he is

---

[43] Assuming that his case would take about two years to reach judgment, Mr. Dodoo had a claim for back pay of about $10,000. And although he had the potential to recover damages for emotional distress and punitive damages, recovery of any such damages would have been extremely speculative.

restricted in his ability to do so by a requirement that the fee agreement must provide that any court awarded attorney fee will be applied, dollar for dollar, against the agreed portion of the client's recovery that is to be retained by the attorney. In such cases, a portion of the client's recovery, even if it is the maximum fifty percent permitted by Oklahoma law,[44] can in many cases be seen by prospective counsel at the outset as insufficient to justify the work and risk of nonpayment if the suit is not successful. When this is true, it is *only* by means of being permitted to offer a fee arrangement by which his attorney will receive, if the suit is successful, *both* the statutory fee award *and* an agreed portion of judgment or settlement of the client's substantive claim that he can reasonably expect to obtain competent counsel. If putative civil rights plaintiffs are precluded from offering such compensation because their prospective attorneys are not permitted to accept it, the result will in many cases not be that the plaintiff pays less to his attorney, but that he does not become an actual plaintiff in the first instance because the law will not allow him to pay what is necessary to obtain representation.

This is exactly the concern that caused this Court to unanimously reject the claim of the plaintiff in *Venegas*. "[D]epriving plaintiffs of the option of promising to pay more than the statutory fee if that is necessary to secure counsel of their choice would not further [the statute's] general purpose of enabling such plaintiffs in civil rights cases to secure competent

---

[44] *See* 5 Okla. Stat § 7.

counsel."[45] This policy that civil rights plaintiffs must be permitted to offer what is necessary to attract competent counsel is no less frustrated when potential plaintiffs are forbidden to offer a fee of the kind by which the Petitioner and Mr. Nation were retained than it would be by forbidding the kind of fee arrangement used in *Venegas.*

C. Assertedly contrary caselaw

The Oklahoma Supreme Court relied upon several federal appellate cases in reaching its conclusion that federal law will not permit the fee that the plaintiff agreed to pay the defendants.[46] That reliance was misplaced. None of the cases involved a fee agreement in which a prospective civil rights plaintiff *expressly agreed* to pay a fee that would include both the statutory attorney fee and a portion of the plaintiff's recovery.[47] Moreover, each of the cases relied upon by the

---

[45] *Venegas,* 495 U.S. at 89-90.

[46] *See* Appendix at A—19-21, ¶¶ 37-41.

[47] The only case cited by the Oklahoma Supreme Court — and the only case known to the Petitioner — in which there was an actual agreement by the client that his attorney would receive both the statutory attorney fee and a percentage of his recovery is *International Travel, Inc. v. Western Airlines, Inc.,* 623 F.2d 1255 (8th Cir. 1980). The fee arrangement in that case provided that one of the plaintiff's two attorneys would receive 45% of the total sums paid by the defendant and the other would receive the statutory attorney fee attributable to his services. *See id.* at 1277. And it is

Oklahoma Supreme Court was decided prior to *Venegas*. Again, to the Petitioner's knowledge, the validity under federal law of a fee of the kind that Mr. Dodoo agreed to pay has never previously been considered by any court. Subsequent to *Venegas*, the Petitioner is aware of no decision that has held *any* fee arrangement knowingly and voluntarily agreed to by a

---

true that the Eighth Circuit found the fee arrangement unreasonable under the particular facts of that case. This case is not, however, one that could have formed a proper basis for the lower court's decision.

It is, at the outset, unclear whether the conclusion of the Eighth Circuit could survive *Venegas*. Bu even if it could, this was an antitrust case in which the attorney receiving 45% of the total sums paid by the defendant took his percentage from a recovery by the plaintiff that had been tripled by statute such that the total payment by the defendant was in excess of a half million dollars. *See id.* Moreover, the statutory attorney fee, under an attorney fee statute different from the statute governing statutory attorney fees in civil rights cases, had been increased to take into account the contingent nature of the attorney's compensation — something that is no longer permitted in civil rights cases. *See id.* at 1273-74. These facts were considered by the court as well as the fact that, under the antitrust attorney fee statute, "the major purpose for the statutory award for attorney's fees was to prevent substantial diminution of the plaintiff's trebled damage recovery." *Id.* at 1278. This is very different from the policy underlying the civil rights attorney fee statute, which is that the fee received by the attorney must be sufficient to ensure that those having civil rights claims of modest amount will be able to attract competent counsel. *See Venegas v. Mitchell*, 495 U.S. 82 (1990)("[D]epriving plaintiffs of the option of promising to pay more than the statutory fee if that is necessary to secure counsel of their choice would not further [the statute's] general purpose of enabling such plaintiffs in civil rights cases to secure competent counsel.").

prospective federal civil rights plaintiff to be in violation of federal law.

III. What the case does not involve

The Petitioner does not challenge the authority of the Oklahoma Supreme Court to impose disciplinary sanctions in any case in which an attorney's fee is found to be "unreasonable" and thus in violation of Rule 1.5 of the Oklahoma Rules of Professional Conduct. But that court's authority in this respect is not an issue presented to this Court. What is instead at issue is the Oklahoma Supreme Court's per se determination that, without regard to whether the fee would be reasonable under the facts of the case, prospective federal civil rights plaintiffs may not offer, because the attorneys whose representation they solicit are forbidden by federal law to accept, a fee contingent upon the success of the litigation that is to consist of both the statutory attorney fee and a portion of the plaintiff's substantive recovery. This is a question that can and should be resolved by this Court as a matter of law.

CONCLUSION

The Petitioner would respectfully ask that a Writ of Certiorari issue to review the decision of the Oklahoma Supreme Court.

Respectfully submitted,

Joseph Righton Weeks
Oklahoma City University School of Law
2501 N. Blackwelder
Oklahoma City, OK 73106
(405) 521-5186

1998 OK 83

FOR OFFICIAL PUBLICATION

[Filed July 14, 1998]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., Oklahoma Bar Association,	)	
Complainant,	)	
v.	)	
JOSEPH WEEKS,	)	SCBD # 4123
Respondent.	)	
STATE OF OKLAHOMA, ex rel., Oklahoma Bar Association,	)	
Complainant,	)	
v.	)	SCBD # 4125
MARK NATION,	)	
Respondent.	)	

¶0 Bar disciplinary proceedings in which respondents allegedly violated Rule 1/5(a) of the Rules of Professional Conduct, providing a lawyer's fee shall be reasonable. Respondents were employed to represent a client in a civil rights action. Respondents retained the entirety of the contingent fee in addition to the statutory fee. The Professional Responsibility Tribunal recommended neither respondent be disciplined. The Oklahoma Bar Association seeks our

imposition of public censure upon respondents. After our de novo review, we find cause for public censure of respondent Joseph Weeks and we agree with the recommendation of the trial panel as to respondent Mark Nation.

PUBLIC CENSURE AND PAYMENT OF COSTS TO RESPONDENT JOSEPH WEEKS ONLY.

Allen J. Welch,
Assistant General Counsel,
Oklahoma Bar Association,
Oklahoma City, Oklahoma — For Complainant

Joseph R. Weeks,
Oklahoma City,
Oklahoma — Respondent

Calvin W. Hendrickson,
Oklahoma City, Oklahoma — For Respondent Nation

PER CURIAM:

¶1 In this appeal from a bar disciplinary proceeding we are asked to decide whether respondents, attorneys for a prevailing plaintiff in a civil rights action, received an unreasonable fee in violation of Rule 1.5(a) of the Oklahoma Rules of Professional Conduct, when they collected both the full amount of the attorney fees received in settlement with the defendants pursuant to 42 U.S.C. § 1988, and the full amount of the agreed upon contingent fee from the client's recovery. Rehearing of our previous decision in SCBD 4123 is granted. Our previous opinion is withdrawn and this opinion is substituted therefor.

¶2 We agree with appellant, Oklahoma Bar Association, that respondents' dual fee arrangement at issue violated Rule 1.5(a). We find their recovery of the contingent attorney's fee was not warranted under existing federal law, and therefore they obtained money from their client's recovery which they were not entitled to receive. As discussed below, we conclude that respondent Nation should not be disciplined but that respondent Weeks should be publicly censured.

I.

¶3 The facts of this matter are substantially undisputed. In November of 1993, the client, Nathaniel Dodoo, contacted respondent Mark Nation in an effort to obtain counsel to represent him in a civil rights action based on allegations of racial discrimination. Nation had graduated from law school only one year before and because of his limited experience in this complex area, he asked respondent Joseph Weeks to help him with the case. Nation was familiar with Weeks and his good reputation in this area of the law as Weeks is a member of the faculty at the law school from which Nation had just graduated.

¶4 Weeks reviewed the relevant information and agreed to serve as co-counsel. Once involved in the case, Weeks prepared the complaint and the representation agreement the parties signed, which is at issue in this proceeding. That agreement is a five page single-spaced document which provides that respondents would retain any court awarded or negotiated fee *and* 50% of any judgment or settlement paid by defendants. The contract provides in relevant part:

". . . One half (1/2) of any amounts received by Mr. Dodoo, through a court judgment or a settlement agreement between the parties to the dispute (hereafter referred to as 'the contingent amount'), shall be paid jointly to Mr. Weeks and Mr. Nation.

Mr. Weeks and Mr. Nation will undertake reasonable and necessary steps to pursue obtaining a negotiated or court ordered attorney fee if such an award of attorney fees is available under the claims on which the litigation is successful. Mr. Dodoo hereby assigns to Mr. Weeks and Mr. Nation his right to seek or obtain such an attorney fee as a prevailing party in litigation of his claims and further assigns to them his right to waive any such attorney fee.

Because of the risk involved in obtaining no judgment or settlement and the possibility of Mr. Dodoo's receipt of a nonmonetary form of relief such as reinstatement, it is understood that any negotiated or court ordered attorney fee obtained by Mr. Weeks and Mr. Nation will be retained by them in addition to the contingent amount . . . and . . .

In the event that a settlement or judgement is obtained that does not contain nonmonetary relief . . ., Mr. Weeks and Mr. Nation will receive . . . in addition to the retainer, (1) the contingent amount . . . and (2) any negotiated or court awarded attorney fee."

¶5 After a relatively short time, respondents negotiated a settlement with defendants on plaintiff's claim in the amount $50,000. At plaintiff's request, respondents agreed to reduce their contingent fee amount to 40% of the recovery. Respondents thereby retained $20,000 as their 40% contingent

fee and they gave Mr. Dodoo $30,000, which was 60% of the recovery.

¶6 Respondents subsequently negotiated a settlement with the defendants for attorney's fees and costs pursuant to 42 U.S.C. § 1988, in the amount of $23,417.68. Respondents did not advise or consult Mr. Dodoo while they were negotiating for the attorney's fee or upon their acceptance of it. Respondents retained for themselves $43,417.68 as their fee; $23,417.68 as the statutory attorney's fee obtained in the settlement and $20,000, the 40% contingent fee amount, while Dodoo's recovery was but $30,000.

¶7 According to his grievance filed with the Bar Association, Mr, Dodoo had been unable to find out from respondents the total amount of money they had collected from his case, even after the action was over. Mr. Dodoo stated he was able to find out the total amount for which the case settled only by going to the federal courthouse and checking the file. There he learned that on August 26, 1994, respondents Weeks and Nation had filed a release and satisfaction acknowledging receipt of $73,417.68 from the defendants.

II.

¶8 The Oklahoma Bar Association filed complaints against respondents Weeks and Nation, licensed attorneys, alleging they violated Rules 1.2(a), 1.4, 1.5, 1.7(b), 1.15(b) and (c), and 8.4(c) of the Rules of Professional Conduct as well as Rules 1.4(b) and (d) of the Rules Governing Disciplinary Proceedings. Subsequently, the Bar Association charged respondents by amended complaint with violating Rule 1.5(a) of the Rules of Professional Conduct which provides: "A

lawyer's fee shall be reasonable."[1] The Bar sought imposition of professional discipline. The actions were made companion cases and the proceeding before the trial panel concerned both respondents. Unless otherwise indicated, references in this opinion include both respondents.

¶9 The character of the fee arrangement which allowed respondents to retain dual fees was the focus of the disciplinary proceeding. Respondents contend that the other charges in the original complaint were abandoned by the Bar Association, but the record does not support that position. The Bar Association presented no evidence beyond the stipulations of the parties in support of the charges of the original complaint and the amended complaint. Only respondents testified at the hearing

---

[1] In its entirety, the Rule provides:

"(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent."

before the trial panel. The Bar Association and the respondents entered into a stipulation of fact for submission to the Professional Responsibility Tribunal which included the following:

> "On August 26, 1994, the defendants filed with the Court a Release and Satisfaction, which acknowledged receipt of $73, 417.68 from the defendants. Neither Weeks or Nation consulted Dodoo while negotiating, or upon acceptance of, the $23,417.68 received for attorney fees and costs."

¶10 The matter was tried as a question of law on agreed and stipulated facts. The trial panel of the Professional Responsibility Tribunal recommended that no discipline be imposed and set forth the following suggestion in its findings that this Court should:

> ". . . Interpret Rule 1.4 of the Rules Governing Disciplinary Proceeding, Rule 1.5 of the Rules of Professional Conduct, and 5 O.S.A Section 7, with respect to a fact situation such as this. Attorneys in the future could then appropriately deal with clients knowing what is required."

¶11 The facts reveal that Nation played a very minimal role in representing Mr. Dodoo; he relied on Weeks, the far more experienced attorney, to guide him through the process. To Weeks' credit, he has been quite forthright in acknowledging and accepting the disproportionately larger share of responsibility for these actions.

III.

¶12 This Court possesses exclusive original jurisdiction in Bar disciplinary proceedings. Rule 1.1, Rules Governing Disciplinary Proceedings, 5 O.S. 1991, Ch. 1 App. 1-A; *State ex rel. Okl.BarAss'n v. Eakin,* 1995 OK 106, 914 P.2d 644 (Okl.1995); *State ex rel. Okl.BarAss'n v. Raskin,* 1982 OK 39, 642 P.2d 262 (Okl.1982). The Supreme Court's review is by de novo consideration on the entire record. Neither the parties' stipulation of fact nor the Tribunal's findings, conclusions of law nor recommendations of discipline are binding on this Court. Rule 6.15, Rules Governing Disciplinary Proceedings; *State ex rel. Okl.Bar Ass'n. v. Fagin,* 1992 OK 188, 848 P.2d 11 (Okl.1992); *State ex rel. Okl.Bar Ass'n. v. Eakin, supra.* The ultimate responsibility to impose discipline in a case before this Court is ours alone. The burden is on the Bar Association as the party seeking re-examination of the record to show why the trial panel's recommendations should not be accepted. *Raskin, supra.* The Bar meets its burden here.

¶13 The positions of the parties on this appeal can be simply stated. The Bar Association is not concerned with he **amount** of the fee collected by the respondents, but rather challenges the **character** of the fee agreement created in the employment contract which allows respondents to retain the entirety of **both** fees. The Bar submits that respondents could have recovered **either** the contingent contract fee **or** the statutory fee, but **not both.** The Bar suggests that the agreement should have provided that any statutory attorney's fee recovered by settlement or court award would be applied against the contingent amount owing under the agreement with their client, rather than in addition to it. Under that arrangement, because the negotiated statutory fee recovered was

greater, Mr. Dodoo's liability under the contingent contract would have been deemed satisfied. If the contingent fee had been greater, Mr. Dodoo would have been responsible for the difference between the two amounts, but not the entire contingent fee. The Bar Association submits that respondents' dual recovery was an unwarranted windfall not authorized by federal law which constitutes an unreasonable attorney fee in violation of 1.5(a). We agree.

¶14 Respondents' arguments primarily focus on their contention that the dual fee arrangement is necessary and serves important public policy interests. In his testimony before the trial panel and in his briefs, respondent Weeks repeatedly stressed that larger fees make civil rights cases more attractive to competent lawyers, thereby enabling deserving plaintiffs, who could not otherwise afford to employ counsel, to obtain effective representation. Respondent Weeks also testified that fee arrangements of this type are in standard usage by attorneys in civil rights litigation in the Western District of Oklahoma and he believed that without the possibility of this type of dual recovery in a successful case, he, and other experienced lawyers who represent civil rights litigants, would cease accepting these cases.

¶15 In respondent's view, neither the contingent fee nor the statutory fee is sufficient in itself to compensate lawyers in civil rights cases. Weeks explained that a contingent fee may be quite small even in a successful civil rights case, since a significant monetary recovery is often not the outcome of an action for injunctive or declaratory relief. He repeatedly testified that the statutory fee alone also ordinarily provides insufficient compensation because the federal district courts routinely undervalue the hourly rate of an attorney with his

experience and undercompensate the number of hours as well, often significantly reducing the billable hours used to calculate a "reasonable" fee under § 1988. According to respondent Weeks, this leads to court awarded fees that are inadequate to compensate attorneys for the tremendous work required in civil rights actions and their considerable risk of not succeeding after so much time and effort is expended, making these cases much less attractive to qualified attorneys.

¶16 Respondents submit that this need to supplement statutory attorney's fees with the addition of the full amount of the contingent fee which they advocate here, has taken on increased significance and urgency because the Supreme Court of the United States has now clearly established that the statutory attorney fee cannot be enhanced based on the contingent nature of the attorney's compensation. All uncertainty surrounding this question, respondents concede, was put to rest in *City of Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638 (1992), where the Supreme Court held that enhancement for contingency is not permitted under fee shifting statutes such as § 1988. Compare *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 107 S.Ct. 2078(1987)(*Delaware Valley II*).

¶17 Respondents take the position that, since *Dague,* there is no longer any basis for the belief that an attorney will receive a "reasonable fee" from a statutory award pursuant to § 1988, at least in this district. They argue that because of the holding in *Daugue*, together with the likelihood that the courts will substantially undervalue the hours and rate of an attorney's compensation, there is no alternative but to conclude that statutory fee awards *must* be supplemented with the full amount of the contingent fee. This is so they submit, because a plaintiff

may have to offer dual compensation to obtain counsel of his choice. They argue that a ruling by this Court proscribing the recovery of both fees would violate the Supremacy Clause of the United States Constitution, as well as Art. 1, § 1 of the Oklahoma Constitution, as it would frustrate the congressional policy enacted in § 1988 intended to attract competent counsel to accept civil rights litigation so that plaintiffs who do not have the funds to hire attorneys and enforce important constitutional and civil rights may do so.

¶18 We are not persuaded by respondents' self-serving arguments offered in support of their views that they should be paid twice for one job. It seems obvious to us that a bar disciplinary proceeding before this Court is a singularly inappropriate forum to seek relief from federal policies regarding attorney's fees in federal cases and complain about decisions of the United States Supreme Court implementing them. If respondents have concerns about the adequacy of attorney fees awarded by federal courts in general and the effect of those fee calculations on public policy considerations, such as the availability of counsel, they should present them to the attention of the federal judiciary and Congress. These matters are not the business of this Court. Rather, it is the responsibility of this Court in disciplinary matters to safeguard the interests of the public, the courts and the legal profession from lawyers who violate standards of professional conduct. *Raskin,* supra.

¶19 While we must address the arguments raised by the parties, it has not escaped the Court's attention that respondents' arguments are not framed by the facts of this case. Their recurring theme centers about the factors causing the alleged insufficiency of court awarded attorney's fees in these

matters: the courts' undervaluation of attorneys' hours and rates, and the fact that the statutory fee cannot be enhanced by the existence of the contingency contract. Respondents' statutory fee, however, was not obtained by award of the court, but in voluntary settlement with the defendants. If respondents believed this settlement amount was too small, they should not have accepted it. In point of fact, this Court is of the opinion that the fee respondents received was not insufficient by any standard: Respondent Weeks testified he worked approximately 50 hours on the case which was settled by negotiation within six months for $50,000 and $23,000.00 in attorney's fees.

¶20 In this case, of course, the federal district court had no opportunity to determine a reasonable statutory fee or consider the reasonableness of the contingent fee arrangement since the parties reached an agreed settlement. If the court had awarded the statutory fee in an amount the respondents considered insufficient, they could have appealed and presented their policy concerns to the Tenth Circuit.[2]

---

[2] We note in passing that the Court of Appeals has expressly recognized the policy considerations raised by the respondents. In *Cooper v. Singer,* 719 F.2d 1496, 1506 N.14 (10th Cir.1983), the Court stated:

We recognize that civil rights attorneys may decline to accept cases notwithstanding a guarantee of the amount that may be potentially awarded under section 1988. To the extent that these decisions reflect that the respective cases lack legal merit, the intendment of section 1988 is fulfilled -- section 1988 encourages only meritorious litigation. However, if civil rights attorneys decline meritorious cases because they expected fee awards are less than the market value of their services, then the courts have failed to fulfill their obligation

¶21 Respondents' concerns about the "enhancement" of their statutory attorney fees, whether controlled by pre-Dague or post-Dague factors, are not placed at issue by these facts. That concept does not apply to a settlement between parties. Enhancement is tied, by definition, to a **court's** award of attorney fees to a fee applicant seeking from the **court** an upward adjustment of the lodestar figure the **district court** calculated. See *Dague,* supra; *Blum,* supra. What respondents are advocating here, on the other hand would be more properly styled "self-enhancement" of fees, or simply "self-help." This is not a viable concept in the area of attorney's fees.

IV

¶22 It is necessary to provide some background of the legal issues which frame this matter in order to explain the question before us and our answer. The Civil Rights Attorney Fees Award Act of 1976, 42 U.S.C. § 1988, provides that in selected civil rights actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the cost."

¶23 "The purpose of § 1988 is to insure effective access to the judicial process' for persons with civil rights grievances. Accordingly, a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust'." *Hensley v. Eckerhart,* 461 U.S. 424, 430, 103 S.Ct. 933, 1937, 76 L.E2d 40 (1983). *[internal quotation marks and citation omitted].* A party is a "prevailing party" for

---

under section 1988 to award reasonable fees. We therefore stress again it is essential that the fee awards reflect the fair value of actual services rendered on successful claims.

purposes of entitlement to attorney's fees under § 1988 in a case that settles favorably to claimant prior to trial. *Maher v. Gagne,* 448 U.S. 122, 129, 100 S.Ct. 2570, 2575, 65 L.E2d 653,661 (1980).

¶24 Congress intended that the fee awarded a prevailing plaintiff should be adequate to attract reasonably competent counsel, "but not produce windfalls to attorneys. (citations omitted)" *Blum v. Stenson,* 465 U.S. 886,896 104 S.Ct. 1541,1548, 79 L.Ed.2d 891 (1984). Fee shifting statutes, such as § 1988, "were not designed as a form of economic relief to improve the financial lot of attorneys, nor where they intended to replicate exactly the fee an attorney could earn to a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws. Hence, if [a plaintiff finds] . . . it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee' the purpose behind the fee shifting statute has been satisfied." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565, 106 S.Ct.a3088, 3098, 92 L.Ed. 2d 439 (1986) (*Delaware Valley I*).

¶25 The right to collect attorney's fees awarded under § 1988, belongs to the prevailing party, not his attorney. *Evans v. Jeff D.* 475 U.S. 717, 106 S.Ct. 1531; *Venegas, supra.* The determination of what a "reasonable fee" may be in each case and the factors upon which that figure should be determined, has led to its own fairly long line of litigation. See *Blum v. Stenson, supra; Delaware Valley I, supra; Delaware Valley II, supra, Hensley, supra; Dague, supra.*

¶26 There is a "strong presumption" that the "reasonable fee" contemplated by § 1988 is the product of "reasonable hours times a reasonable rate." *Dague, supra; Delaware Valley I;* 478 U.S. at 565, 106 S.Ct. 3098. This figure is known as the "lodestar" and it has become the "guiding light of our fee shifting jurisprudence." *Dague,* 505 U.S. 557, 563, 112 S.Ct. 2638, 2641.

¶27 An upward adjustment of the lodestar amount is permissible only in "rare" and "exceptional" cases and the fee applicant bears the additional burden of showing the adjustment is "necessary." *Blum v. Stenson, supra,* at 1548. Certain particular factors may be considered by the court in its inquiry of deciding whether to adjust the fee upward or downward although many of those factors are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. *Hensley,* 461 U.S. 424, 434 N.9; 103 S.Ct. 1940.

¶28 While the interaction of contingent contract fees with § 1988 was not addressed by Congress, it has been the subject of decisions of the United States Supreme Court and lower federal courts. The Supreme Court has not passed directly on the narrow issue before us, although it has addressed closely related questions and those decisions are pertinent here. As the Bar Association points out, there are lower federal court decisions directly on point, and those will be discussed below. No decision has approved, directly or indirectly, the fee arrangement respondents defend here.

¶29 The Supreme Court has accepted that statutory awards can coexist with private fee arrangements. *Venegas v. Mitchell,* 495 U.S. 82, 110 S.Ct. 1679 (1990). A contingent fee arrangement does not impose an automatic ceiling on the

award of attorney's fees under § 1988. *Blanchard v. Bergeron*, 489 U.S. 87, 92, 109 S.Ct. 939, 944 (1989). In *Blanchard*, the Court found that the presence of a contingent fee may aid a court in assessing the reasonableness of the fee award, but that it would be inconsistent with the policy and purpose of § 1988 if the contingent contract were dispositive. The Court rejected the idea that an approach other than the lodestar calculation, the "centerpiece of attorney's fee awards", should be followed where a contingent fee agreement exists. The Court stated:

> "As we understand § 1988's provision for allowing a 'reasonable attorney's fee,' it contemplates reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less. Should a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount. The defendant is not, however, required to pay the amount called for in a contingent-fee contract if it is more than a reasonable fee calculated in the usual way."

¶30 A prevailing party may be required to pay his attorney a contingent fee which exceeds the statutory award. In *Venegas, supra*, the United States Supreme Court addressed the issue of whether a prevailing party may have his liability under a contingent fee agreement disallowed or reduced when the contingent amount is greater than the statutory award under § 1988. The client argued that because of the Court's holding in *Blanchard* that a contingent fee amount does not impose a cap on court awarded fees, his contingent fee should also be ignored for his benefit so he would not have to pay his lawyer more than the "reasonable" fee awarded by the court against the

defendant. The Supreme Court held that nothing in § 1988 invalidated a contingent fee contract's provision for a plaintiff to pay his attorney more than the statutory fee if he chose, nor did the section interfere with the enforceability of such a provision.

¶31 Respondent's reliance on *Venegas* in support of their position is misplaced, however, as the facts and the contractual agreement differ significantly from this case. First, the client's contingency contract obligation in *Venegas* was **greater** than the statutory award, not less. Here, Mr. Dodoo's contingent fee liability is less ($20,000), not more, than the statutory fee negotiated with defendant by settlement ($23,000.00). Most importantly, in *Venegas* the client had to pay his attorney only the difference between his greater contingency fee award and the statutory award. The employment contract at issue there expressly provided that "any fee awarded by the court would be applied dollar for dollar to offset the contingent fee.". Accordingly, the prevailing plaintiff was held responsible for paying 40% of the recovery ($406,000.00) **offset** by the amount of the § 1988 attorney's fee award ($75,000.00).

¶32 The representation agreement prepared by respondent Weeks and entered into by the parties, has no provision for the contingent fee to be offset or credited by the statutory fee. To the contrary, Weeks' testimony revealed that he intentionally designed the agreement to *prevent* any offset by expressly providing that the statutory fee would be retained "in addition" to the contingent fees.

¶33 Respondent Weeks dismisses the Bar Association's suggestion that a dollar for dollar offset of the contingency fee such as that in Venegas should have been included in their fee

agreement. He contends that such a provision is only workable in a case such as *Venegas* which has the expectation of a very large damage recovery if the case is successful. In keeping with his consistent position, he argues that in an action such as Mr. Dodoo's, which has a very small potential recovery, only a fee arrangement which includes the full amount of the contingent fee in addition to the statutory fee will interest competent counsel to become involved in the case.

V.

¶34 While respondents have presented self-serving arguments claiming that important public policy interests would be served by allowing them to receive dual fees, they have cited no legal authority, case law or statutory, which permits this fee arrangement. We do not find this surprising since no statute allows it and case law has consistently disapproved this dual recovery.

¶35 Even though the trial panel recommended no disciplinary measures for respondents, it recognized that the character of their fee arrangement was extraordinary and presented cause for concern. The panel noted, "If this contract had included some phrase to the effect that attorneys would receive either the 'contingency' or the 'court awarded attorney fees' with the phrase 'not to exceed 50% of the total amounts awarded or collected" this question would not be before us."

¶36 As the Bar Association correctly notes, this suggested arrangement would be in keeping with the general rule as set forth in annot., Effect of Contingent Fee Contract of Fee Award Authorized by Federal Statute, 76 A.L.R.Fed347, 352 (1983), which states:

> "In general, the cases explicitly or implicitly hold that the statutory award of attorney fees should not be treated as an amount in addition to that received or to be received by the attorney under a contingent fee contract, with many courts explicitly holding that the award is to be credited against the amount owed to the attorney under the contract, and if the award equals or exceeds the contractual fee, that amount is deemed paid and satisfied."

¶37 Those federal courts which have considered the issue of an attorney's recovery of both the court awarded statutory fee and the entirety of the contingent fee amount, have disallowed the arrangement as inappropriate and a windfall to the attorney. In *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 923, (8th Cir.1986), the Court of Appeals affirmed the district court's award of statutory fees but ordered that award applied on the amount due under the contingency agreement, **not** received in **addition** to that agreement. That contingent fee was silent on the question of whether it would be reduced by the statutory fees awarded. The court noted the broad supervisory powers of courts over contingency fee agreements as well as the duty of courts under § 1988 to award reasonable fees, and determined that the attorneys would receive a windfall if they were to receive both the statutory fee award and the full amount due under the contingent fee agreement.

¶38 In *Sullivan v. Crown Paper Bd.Co., Inc.*, 719 F.2d 667 (3rd Cir.1983) the Third Circuit remanded an action for consideration of the contingent agreement terms, stating that counsel should recover the contingent amount or the statutory amount, whichever is greater. The court determined that where the contingent fee is greater, plaintiff would be directed to pay counsel the difference between the two fees. Where (as here)

the statutory fee is greater, plaintiff's contingent obligation to counsel should be deemed settled. Similarly, in *Sargeant v. Sharp,* 579 F.2d 645, 648 (1st Cir.1978), the Court of Appeals suggested that where the attorney has been paid a contingent fee in an amount equal to or above the amount of a statutory fee award, plaintiff should be reimbursed that amount when the court sets the fee, Plaintiff should be paid "any excess over that amount of the fee arrangement" going to counsel.

¶39 Likewise, in *Wheatley v. Ford,* 619 F.2d 1037, 1041 (2nd Cir.1982), plaintiff's fee obligation to his attorney was deemed paid and satisfied" to the extent of the § 1988 statutory award ordered. In *International Travel, Inc. v. Western Airlines, Inc.,* 623 F.2d 1255 (8th Cir. 1980), the client was represented by co-counsel and the contract provided that one attorney would receive the entire contingency fee award (45% of the total recovery) and the other counsel would receive the statutory fee award. The net effect of the contract was, as the Bar Association notes, similar to that of the representation agreement employed by respondents here. After review, the court objected to the fee arrangement, finding that it breached the "outer limits of reasonableness".

¶40 In *Hamner v. Rios,* 769 F.2d 1404 (9th Cir.1985), the Court of Appeals remanded an action for determination of a reasonable statutory fee. Emphasizing the power of the courts to supervise fee awards under contingency contracts to avoid unreasonable results, the Court instructed the lower court to determine a reasonable statutory fee award, and then, if the statutory award was less than the contingent fee, to consider whether plaintiff should be compelled to pay the difference between the statutory amount and the contingency fee.

¶41 In *Venegas v. Skaggs,* 867 F.2d 527 (9th Cir.1989), the Ninth Circuit affirmed the district court's ruling that contingent fee arrangements which exceed the statutory award are permissible under § 1988, as that statute does not set a ceiling on plaintiff's entitlement to fees under a contingent fee contract. This ruling was later affirmed by the Supreme Court in *Venegas v. Mitchell, supra.* Addressing the issue of whether plaintiff should be required to pay the difference between the statutory fee and the greater contingency contract amount, the Court answer in the affirmative in a manner that leaves no doubt that under our facts (where the statutory award is greater than the contingent amount) the Court would consider the dual recovery improper. The Court stated, "The plaintiff's attorneys are not entitled to both the statutory award and the full amount of the contingent fee." At 534 n.7.

VI.

¶42 In keeping with the above authorities, we are compelled to the conclusion that by retaining the entirety of the contingent fee deducted from Mr. Dodoo's recovery in addition to the statutory fee, respondents' fee arrangement exceeded existing federal case law. We find that the Bar Association has therefore met its burden of showing by clear and convincing evidence that respondents' fee arrangement violated Rule 1.5(a). Attorneys who take a greater share of the amount of money recovered for a client as an attorney's fee than they are entitled to receive under existing law are subject to discipline. *State ex rel. Okl. Bar Ass'n. v. Fagin,* 1992 Ok 118, 848 P.2d 11(Okl.1992); *State ex rel. Okl Bar Ass'n. v. Mason,* 1063 OK 89, 380 P.2d 961 (Okl.1963); *State ex rel. Okl. Bar Ass'n v. Moss,* 1978 OK 61, 577 P.2d 1317(Okl. 1978).

¶43 We are not persuaded by respondents contentions that charges against them are inappropriately brought by the Bar Association under Rule 1.5(a). They contend that the reach of that provision is limited to challenges to the amount of fees taken from a client's recovery, and because their contingent percentage of Mr. Dodoo's recovery was only 40% (less than the statutory minimum of 50% set by 5 O.S. 1991, § 7), the rule is not properly implicated. Respondents additionally argue that Rule 1.4(d) of the Rule Governing Disciplinary Proceedings precludes the imposition of discipline under Rule 1.5 here as there was no showing or finding of extortion or fraud by the trial panel. That rule provides that controversies "as to the amount of fees shall not be considered a basis for charges unless it is made to appear that the amount demanded is extortionate or fraudulent."

¶44 This controversy, or course, does not concern the amount of a contingent fee and it was not necessary to make a showing or finding of extortion here. We find that the reasonableness standard of Rule 1.5(a) encompasses, by definition, the minimum requirement that a fee received by an attorney licensed by this Court must be warranted by existing law.[3] An unwarranted fee is per se unreasonable fee.

---

[3] Rule 1.5 now covers the provisions formerly set forth in DR-2-107, 5 O.S.Supp.1983, ch.1, App.3, as follows:

"A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. . . . . A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee . . ."

See State ex rel. Okl.Bar Ass'n. v. Watson, supra, Oklahoma

¶45 Additionally, it is undisputed that respondents failed to communicate with Mr. Dodoo about the negotiations and settlement of the statutory attorney's fee in violation of Rule 1.4, as charged in the original complaint. Respondents do not deny that they failed to inform their client. In fact, they made it clear in their pleadings; they also stipulated to it, testified about it and discussed it in their briefs. Respondent Weeks' consistent explanation for the omission was that the fee was theirs, not Mr. Dodoo's, and since he had no claim to it, he had no reason to know about it. Weeks reasoned that if Mr. Dodoo had been a *pro se* litigant, he would not have received attorney's fees and, therefore, the statutory fee was exclusively theirs. This is particularly so, Weeks adds, in light of the assignment of that fee in the representation agreement.

¶46 Respondent is mistaken, however. The fee belonged to Mr. Dodoo. Under applicable federal law, Mr. Dodoo was eligible to collect the statutory fee; it was his right to waive, settle or negotiate that eligibility. *Evans v. Jeff D.*, 475 U.S. 717, 106 S.Ct. 1531 (1986); *Venegas v. Mitchell, supra.* The Bar does not challenge the claimed assignment of the statutory fee, and its validity and effectiveness are not before us for decision today.

¶47 For purposes of addressing the question before us, we find that even if we were to assume, for the sake of argument, that the assignment was valid, respondents were not thereby relieved of their duty imposed by Rule 1.4 to keep their

---

Turnpike Authority v. New Life Church, 870 P.2d 762 (1994).

client informed of the settlement of attorney's fees in his case.[4] This they failed to do.

¶48 For the reasons stated above, we find that clear and convincing evidence shows that the fee arrangement did violate Rule 1.5(a) and respondent Joseph Weeks is hereby publicly censured and is ordered to pay the costs of this proceeding in the amount of $1,134.75, within 90 days of the effective date of this opinion.

KAUGER, C.J., SUMMERS, V.C.J., AND LAVANDER, HARGRAVE, JJ., CONCUR.
SIMMS, J., CONCURS SPECIALLY.
HODGES, J., CONCURS IN RESULT.
OPALA, WILSON, JJ., CONCUR IN PART, DISSENT IN PART.
WATT, J., DISSENTS.

SIMMS, J., CONCURRING SPECIALLY:

¶1 I concur with the majority, however, I would find respondent Nation is also subject to discipline and publicly censure him for his participation in this fee arrangement. Additionally, I would order both respondents to make restitution to Mr. Dodoo of the $20,000 contingent attorney's fee. Even though restitution may undoubtedly be obtained in the district court, I would resolve the issue in this discipline

---

[4] Rule 1.4 provides:

"(a) lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

matter. Respondents obtained a windfall recovery which they were not entitled to receive and I would order them to return it to their client as restitution.

WATT. J., DISSENTING: I would suspend each respondent for some period of time.

OPALA, J., DISSENTING IN PART:

I would (a) *administer* public reprimand to respondents Weeks and Nation; (b) *order* that they pay the costs of this proceeding not later than 90 days after this court's opinion becomes final; (c) *direct* that they not be restored to good standing as licensed Oklahoma practitioners until they have made restitution to Mr. Dodoo, their former client, of $20,000 — the amount of their excessive contingent-fee recovery; and (d) *provide* that they refund the excess fee recovered not later than 30 days after this opinion becomes final. In sum, I join the separate statement authored by Simms, J.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA
BEFORE THE PROFESSIONAL RESPONSIBILITY TRIBUNAL

[Filed March 26, 1996]

STATE OF OKLAHOMA, ex rel., Oklahoma Bar Association,	)	
Complainant,	)	
v.	)	OBAD # 1228
	)	SCBD # 4123
JOSEPH WEEKS,	)	
Respondent.	)	
STATE OF OKLAHOMA, ex rel., Oklahoma Bar Association,	)	
Complainant,	)	OBAD # 1229
	)	SCBD # 4125
v.	)	
MARK NATION,	)	
Respondent.	)	

TRIAL PANEL REPORT

STATEMENT OF FACTS

Weeks and Nation were retained by Dodoo to represent him in a Title 7 Civil Rights Action. A five page, single spaced, written agreement was entered into after consultation with outside private counsel, which provided in part that Weeks and Nation were entitled to receive one-half (1/2) of any judgment or settlement (the contingent fee) and all negotiated or court ordered attorney's fees. Dodoo originally agreed with the fee arrangement, but had misgivings and subsequently negotiated a

reduction of the contingent fee portion of the contract to pay forty percent (40%). A settlement of $50,000 was reached on Dodoo's claim and he received $30,000.00 with Weeks and Nation retaining $20,000.00. Weeks and Nation then received a $23,417.68 attorney fees which they retained. The net result was that of the $73,417.68, Dodoo received $30,000, and Weeks and Nation retained $43,417.68.

There appears to be no question but that the contract was voluntarily entered into. Weeks testified that this type of contract is standard within the Western District and is the only way to get attorneys for these types of cases. Weeks further testified that because of the nature of the cases, even the best attorneys may hopefully expect a 50% success rate, and when calculating his average fee, he has received an hourly rate of $51.00. (This, of course, is an average of both the winning and losing cases).

Weeks felt that this fee was fair, because: (1) The client agreed to and understood the fee in advance of executing the contract: (2) It was a minimum fee necessary to obtain competent counsel; (3) If this type of contract is negated, it would result in less than a reasonable fee in these types of cases: and, (4) It is not unusual for attorney's fees in these types of cases to be in excess of the damage.

FINDINGS AND FACT AND CONCLUSIONS OF LAW

If this contract had included some phrase to the effect that attorneys would receive either the "contingency" or the "court awarded fees" with a phrase "not to exceed 50% of the total amounts awarded or collected", this question would not be before us.

However, the trial panel can come to no other conclusion but that the evidence showed that the contract was entered into with a full understanding between the parties. There was no evidence offered to rebut the statement of Weeks that these types of contracts are the kind normally entered into in this type of case within the Western District. There is likewise no evidence to rebut the fact that without this type of contract it would be difficult to obtain competent counsel for complainants. We must, therefore, determine if based upon this evidence we can find that such a contract is in and of itself inherently unreasonable.

Weeks contends that this is a matter governed by Rule 1.4 of the Rules Governing Disciplinary Proceedings, in that Section D provided that controversies as to the amount of attorney's fees shall not be the basis for charges in a disciplinary proceeding unless it is made to appear that the amount demanded is extortionate or fraudulent. Weeks suggests that there is no evidence of extortion or fraud and therefore, the case must be dismissed. While we agree that

extortion and fraud are not present, we do find that Rule 1.5 of the Rules of Professional Conduct provide that a lawyer's fee shall be reasonable, and that we must determine under the facts in this case if the fee arrangement was reasonable. If so, the case should be dismissed. If not, then we must look to discipline.

Under Rule 1.5, Weeks discussed with the tribunal the eight factors to be considered in determining the reasonableness of the fee. We must also determine whether the contract violates title 5, O.S.A., Section 7, which provides:

> "It shall be unlawful for an attorney to contract for a percentage or portion of the client's cause of action or claim not to exceed 50% of the net amount of such judgment as may be recovered . . ."

The Bar Association suggests that an award of attorney's fee is an award to a client and that, in this case, Dodoo received an award on his claim of $50,000.00 and an award of attorney's fees of some $23,000.00. On the other hand, the trial panel recognized that in some civil rights actions an award of little or no monetary value may be given yet substantial attorney's fees awarded. If the attorney receives this award as his fee pursuant to a contingent fee contract, would the statute be violated? We do not think so. Is it then incorrect to suggest that where a client gets an award plus attorney's fees that the attorney cannot receive a sum in excess of 50% of the entire award? We think that the answer to that question must be founded in the rationalization that where an attorney is entitled to the attorney's fee award, a client cannot complain that an attorney received a sum greater than the client did himself on his

cause of action (but that an attorney cannot accept such a fee award and then demand a percentage of his contingent fee contract to permit recovery in excess of 50%. Common sense and public policy dictate that a contingent fee contract which allows the attorney 50% of the award plus the court awarded attorney's fee cannot stand if the attorney receives a sum greater than 50% of the total award. It would appear that some restriction should be placed on fees allowed in representation contracts so that the court-awarded attorney fee plus such percentage of the contingent fee award does not permit the attorney to recover an amount greater than the percentage of the contingent fee award contracted for. The total of the award should not exceed 50% of all monies awarded. This, however, should not affect any award of substantial attorney fees in cases of nominal damages where that is or has been the agreement.

Respondent make a very effective argument that restricting the amounts of attorney fees allowed will cause attorneys doing this type of work to seek other types of employment. This benefits defendants only, who as a general rule have counsel on retainer or house counsel to handle their litigation, whereas, the claimants have only the incentive of the contingency contract or fees to be awarded, to get their day in court. This is a right and concern that is not taken lightly by this tribunal.

RECOMMENDATION FOR DISCIPLINE

Because we can find no previous cases in line with the facts of this case, and since we unanimously agree that each of the Respondents acted in what they felt was an appropriate manner, we cannot in good conscience recommend any

discipline. We can, however, suggest that our court interpret Rule 1.4 of the Rules Governing Disciplinary Proceeding, Rule 1.5 of the Rules of Professional Conduct, and 5 O.S.A. Section 7, with respect to a fact situation such as this. Attorneys in the future could then appropriately deal with clients knowing what is required. We would therefore recommend that no discipline be given.

/s/ Tom R. Stevenson
TOM R. STEVENSON, Presiding Master

/s/ John Shipp
JOHN SHIPP, PRT LAWYER MEMBER

/s/ Alice Musser
ALICE MUSSER, PRT LAY MEMBER

C-1

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Filed September 8, 1998]

STATE OF OKLAHOMA, ex rel., Oklahoma Bar Association,	)	
Complainant,	)	
v.	)	
JOSEPH WEEKS,	)	SCBD NO. 4123
Respondent.	)	

ORDER

Respondent's Petition for Rehearing is denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 8th DAY OF SEPTEMBER, 1998.

/s/ Yovonne Kauger

CHIEF JUSTICE

CONCUR: KAUGER, C.J., SUMMERS, V.C.J., LAVENDER, SIMMS, HARGRAVE, OPALA, WATT, JJ.

DISSENT: HODGES, WILSON, JJ.